LEGAL PRINCIPAL DISCUSSED

Citation	Parties	Legal Principles Discussed
IN THE COURT OF APPEAL OF TANZANIA AT MWANZA CRIMINAL APPEAL NO. 196 OF 2006. KIMARO J.A,LUANDA J.A. AND MANDIA J.A.	**MWITA GISE @ JOSEPHAT** **MAIGE MWITA VS THE REPUBLIC.** (Appeal from the Judgment of the High court of Tanzania at Mwanza Mlay, J.)	1. Section 231 of the Criminal Procedure Act contains a fundamental right of an accused person the right to be heard before they are judged. It directs that a magistrate must inform an accused person that he/she has a right to make a defence or choose not to make one in relation to the offence charged or reason for such a decision.

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: KIMARO, J.A., LUANDA, J.A., And MANDIA, J.A.:)

CRIMINAL APPEAL NO. 196 OF 2006

1. MWITA GISE @ JOSEPHAT.....APPELLANT
2. MAIGE MWITA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Mwanza)

(Mlay, J.)

dated 17th April, 2006

in

Criminal Appeals Nos. 72 and 73 of 2001

.....

RULING OF THE COURT

4th October & 8th October, 2010

KIMARO ,J.A.:-

In the District Court of Mwanza at Mwanza the two appellants were convicted of the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code [CAP 16, R.E. 2002]. Each of the appellant was sentenced to thirty years imprisonment. Their appeal to the High Court of Tanzania was not successful.

Still aggrieved the appellants have filed this appeal. The first appellant has five grounds of appeal and the second one six grounds.

At the hearing of the appeal the appellants appeared in person and the respondent Republic was represented by Mr. David Z. Kakwaya, learned State Attorney. Both appellants raised in their memoranda of appeal a question of procedural irregularity in respect of their trial. They contended that there was no compliance with the provisions of section 231 of the Criminal Procedure Act, 1985[CAP 20 R.E.2002]. Before they gave their defence, the trial court did not address them on the requirements of section 231 of CAP. 20.

The appellants being laymen, not represented, and the ground of appeal being one of law, the learned State Attorney was required to be the first to address the Court on this ground. Taking us to the record of appeal at page 12, the learned State Attorney said that at the closure of the prosecution case, the trial court made a ruling that the appellants had a case to answer. However, it did not inform the appellants about the procedure that they could use in giving their defence as provided for by the provision of section 231 of CAP 20. He said although the appellants did not take the witness box on that day but on a subsequent day, even on the

day the appellants gave their defence, they were not informed about the mode they could use in giving their defence.

Citing the case of **Ndamashule Ndoshi Vs R** CA Criminal Appeal No. 120 of 2005 (Unreported), he prayed that the proceedings starting from 7th December 1998, the day when the appellants took their defence without the trial court informing them of the available options for making their defence, be nullified.

The learned State Attorney submitted correctly, that the record of appeal does not show that the appellants were made aware of the available options for making their defence as provided for under section 231 of CAP 20. The trial court made a ruling on 29th September, 1998 that the appellant had a case to answer. On that day the appellants did not make their defence. The appellants made their defence on 7th December, 1998, after several adjournments. However, there is nothing on the record of appeal to show that the appellants were informed of the available options given in section 231 CAP 20 for making their defences.

In the case of **Ndamashule** (supra), the trial court did not inform the appellant of the available options for making his defence. The Court after quoting verbatim the provisions of section 231(1) of CAP 20 said:-

"Section 231 of the Act contains a fundamental right of an accused person: the right to be heard before they are judged. It directs that a magistrate must inform an accused person that they have a right to make a defence or choose not to make one in relation to the offence charged or any other alternative offence for which the court could under the law convict. Not only is an accused entitled to give evidence on their defence but also to call witnesses to testify in their behalf. So, the section is an elaboration of all important ***maxim – audi alterem partem*** *and that no one should be condemned unheard."*

In this case the record is silent as to whether the appellants were informed of their right as given in the provisions of section 231 of CAP 20. This was definitely a failure on the part of the trial magistrate to comply with a mandatory provision of the Law. Section 53(2) of the Interpretation Act, [CAP 1 R.E.2002] provides in clear terms that:-

"Where in a written law the word "shall"is used in

conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."

The only way in which an appellate court can ascertain whether or not a trial court has complied with a mandatory provision of the law, is for the trial court to show in its proceedings that it has done so. Short of a clear record to that effect, the trial court will be taken not to have been diligent in carrying out it functions, even where an accused person was informed of such rights. It is for this reason, we emphasize on the importance of trial courts to be diligent in discharging their functions, by ensuring that at every state of the proceedings the accused person is informed of his rights and compliance of that function is reflected on the record of the proceedings.

Since in this case the trial court made no record of it compliance with section 231 of CAP 20, we exercise our powers of revision under section 4(2) of the Appellate Jurisdiction Act, [CAP 141 R.E.2002] and quash all the proceedings starting from 7th December, 1998 and remit the record of the trial court back, with an order that the proceedings in the trial court should

proceed from that stage in compliance with section 231 of CAP 20. It is ordered.

As for the appeal before us, we declare the same to be incompetent because the decision of the High Court was based on proceedings which were partly unlawful. The same are quashed and set aside. The appeal is thus struck out, it is accordingly ordered.

DATED at MWANZA this 5th day of October, 2010.

N. P. KIMARO
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

W. P. Bampikya
SENIOR DEPUTY REGISTRAR